

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS CRIMINAL CASES
REPORT 2017-05

CASE NO.: SC17-

To the Chief Justice and Justices of the Supreme Court of Florida:

This report, proposing 11 amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	<u>Instruction #</u>	<u>Topic</u>
Proposal 1	28.4	Leaving the Scene of a Crash Involving [Death] [Serious Bodily Injury] [Injury]
Proposal 2	28.4(a)	Leaving the Scene of a Crash Involving Only Damage to an Attended Vehicle or Attended Property
Proposal 3	28.4(b)	Leaving the Scene of a Crash Involving Damage to an Unattended Vehicle or Unattended Property
Proposal 4	28.6	Fleeing to Elude a Law Enforcement Officer
Proposal 5	28.7	Fleeing to Elude a Law Enforcement Officer (Siren and Lights Activated)
Proposal 6	28.8	Fleeing to Elude a Law Enforcement Officer (Siren and Lights Activated with High Speed or Reckless Driving)
Proposal 7	28.8(a)	Fleeing to Elude a Law Enforcement Officer (Siren and Lights Activated with High Speed or Reckless Driving Causing Serious Bodily Injury or Death)
Proposal 8	28.8(b)	Aggravated Fleeing or Eluding (Leaving a Crash Involving Serious Bodily Injury, Injury, or Death then Causing Serious Bodily Injury or Death)
Proposal 9	28.8(c)	Aggravated Fleeing or Eluding (Leaving a Crash Involving Damage to a Vehicle or Property then Causing Serious Bodily

Proposal 10	28.8(d)	Injury or Death) Aggravated Fleeing or Eluding (Leaving a Crash Involving Serious Bodily Injury, Injury, or Death then Causing Injury or Property Damage to Another)
Proposal 11	28.8(e)	Aggravated Fleeing or Eluding (Leaving a Crash Involving Damage to a Vehicle or Property then Causing Injury or Property Damage to Another)

The proposals are in Appendix A. Words and punctuation to be deleted are shown with strikethrough marks; words and punctuation to be added are underlined. All of the proposals were published in *The Florida Bar News* on January 15, 2017.

Comments on the Leaving the Scene instructions were received from Attorney Gabrielle Radcliffe and the Florida Association of Criminal Defense Lawyers (“FACDL”). Comments on the Fleeing proposals were received from FACDL and the Florida Public Defender’s Association (“FPDA”). (The FPDA and FACDL submissions also include comments about proposals not relevant to this report). All comments are in Appendix B.

Initial note regarding the Three Leaving the Scene instructions (28.4 & 28.4(a) & 28.4(b)) and Four of the Fleeing instructions (28.8(b) & 28.8(c) & 28.8(d) & 28.8(e))

In *Gaulden v. State*, 195 So. 3d 1123 (Fla. 2016), the Court stated that the word “accident” was less specific than the word “crash” because a crash requires a collision but an accident does not. The Court therefore held the phrase “involved in a crash” means there had to have been a collision with another vehicle, person, or object. To reflect this case law, the Committee deleted “or accident” in the relevant sections of seven of the proposals in this report and added an explanation for “involved in a crash.”

When the proposals were published, the Committee included the holding from *State v. Elder*, 975 So. 2d 481 (Fla. 2d DCA 2007), in the explanation of “involved in a crash.” The *Elder* court had interpreted the statutory phrase of “involved in a crash” to include instances where the defendant’s driving pattern

caused a crash for another. As a result, the published proposals contained the following:

Gaulden v. State, 195 So. 3d 1123 (Fla. 2016); *State v. Elder*, 975 So. 2d 481 (Fla. 2d DCA 2007).

A vehicle is “involved in a crash” if it collides with another vehicle, person, or object, or if it causes another vehicle to collide with another vehicle, person, or object.

That proposal led to comments from FPDA, FACDL, and Attorney Gabrielle Radcliffe, who all pointed out that *Elder* is arguably no longer good law as a result of *Gaulden*. The facts in *Gaulden* were that a passenger left a moving vehicle and landed on the road or the adjacent area. The driver left the scene where the passenger separated from the vehicle. The question to be decided in *Gaulden* was whether those facts fit a statute that requires the State to prove the defendant was “a driver of a vehicle involved in a crash.”

The Court held the phrase “involved in a crash” means that a vehicle must collide with another vehicle, person, or object, which did not include a passenger “colliding” with the road or the ground. The *Gaulden* court did not directly address a fact pattern where the defendant’s vehicle did not collide with another vehicle, person, or object, but the defendant’s driving pattern caused a crash for another. When faced with that fact pattern, the Court may or may not require that it be the defendant’s vehicle that collides with a vehicle, person, or object.

The Committee wanted to ensure that it was not creating law. As a result, the Committee altered its published proposals in two ways. First, in the definitions section, the Committee proposes that the standard instruction explain “involved in a crash” as:

Gaulden v. State, 195 So. 3d 1123 (Fla. 2016).

A vehicle is “involved in a crash” if it collides with another vehicle, person, or object.

Then, in the Comment section, the Committee proposes to add:

It is unclear whether the courts will interpret the statutory phrase of “involved in a crash” as including instances where the defendant’s vehicle did not collide with another vehicle, person, or object, but the defendant’s driving pattern

caused another vehicle to collide with a person, object, or vehicle 3. *See State v. Elder*, 975 So. 2d 481 (Fla. 2d DCA 2007), which was decided before *Gaulden v. State*, 195 So. 3d 1123 (Fla. 2016).

These changes are included not only in the three Leaving the Scene instructions (Proposals 1, 2, and 3), but also in the four Fleeing instructions (Proposals 8, 9, 10, and 11) that cover statutes that include Leaving the Scene in their elements.

Proposal 1 – Instruction 28.4

There are no other changes proposed for the existing instruction other than what was discussed in the initial note. In short, there are essentially three changes: 1) The phrase “or accident” is deleted; 2) a *Gaulden*-based explanation of “involved in a crash” is added; and 3) the Comment section includes a discussion of the *Elder/Gaulden* issue. The proposal was published and the comments from FACDL, FPDA, and Attorney Radcliffe have been addressed in the initial note. After post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 2 – Instruction 28.4(a)

The existing standard instruction for this crime does not contain the phrase “or accident,” so it required not changes to the element section. However, the new explanation from *Gaulden* for “involved in a crash” was inserted as was the new paragraph in the Comment section that addresses the *Elder/Gaulden* issue. Finally, because it is unclear whether the courts will require the State to prove the defendant knew or should have known of the crash or the property damage, a new paragraph was added to the Comment section that explains this issue. The proposal was published and the Committee’s response to the comments from FACDL, FPDA, and Attorney Radcliffe has been addressed. After post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 3 – Instruction 28.4(b)

The instruction for this crime uses the phrase “crash or collision” because § 316.063(1), Fla. Stat., refers to “colliding with” or “involved in a crash.” Therefore, the only change needed for the body of this standard instruction was to add the new *Gaulden* explanation for “involved in a crash.” The Comment section also includes the new paragraph related to the *Elder/Gaulden* issue. Also, the Comment section was updated because there was no case law as of August 2017 regarding whether the courts will require the State to prove the defendant knew or

should have known of the crash or the property damage. The proposal was published and the Committee's response to the comments from FACDL, FPDA, and Attorney Radcliffe has been addressed. After post-publication review, the Committee voted unanimously to file the proposal with the Court.

Initial note for all the Fleeing instructions

In *Koch v. State*, 39 So. 3d 464 (Fla. 2d DCA 2010), and *Lucas v. State*, 192 So. 3d 1269 (Fla. 2d DCA 2016), the Second District decided that when the charging document tracks a fleeing statute (§ 316.1935, Fla. Stat.), jurors must be instructed on the misdemeanor crime of Disobedience to Police (§ 316.072(3), Fla. Stat.) as a lesser-included offense. If the Second District is correct, the crime of Disobedience to Police should be in the Category One boxes in all of the fleeing instructions. The problem for the Committee is that it believes *Koch* and *Lucas* conflict with this Court's case law. This Court held in *In Matter of Use by Trial Courts of Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594 (Fla. 1981), that the Category 1 box should be used for offenses that are necessarily included in the offense charged. The crime of Disobedience to Police has an element that does not exist in any of the fleeing crimes because the Disobedience to Police statute requires the police order or direction to be lawful, but the fleeing crimes do not, at least according to the plain language of the fleeing statutes, *Jackson v. State*, 463 So. 2d 372 (Fla. 5th DCA 1985), and *State v. Kirer*, 120 So. 3d 60 (Fla. 4th DCA 2013).

The Committee was unwilling to assume that the Second District was right and the Fourth and Fifth Districts were wrong. To address the problem, the Committee decided the best course was to leave Disobedience to Police in the Category 2 boxes in all of the fleeing instructions and to add an asterisk that refers people to the Comment sections. In the Comment sections, the Committee did not think merely citing *Koch* was sufficient. In order for everyone to understand the issue, the Committee explained the problem fully so that trial judges can decide whether they want to instruct on Disobedience to Police as a lesser-included offense when the charging document tracks a fleeing statute.

FPDA submitted a comment regarding the published Committee note. According to FPDA, the language in the published proposal was argumentative, personal to the Second DCA, and made the prosecution's argument but not the defense's argument. The Committee asked FPDA for clarification about what the defense argument would be. The FPDA clarification (included in Appendix B) essentially says that the State may include language in its charging document that

the “police order was lawful.” FPDA said that since that language may be charged, the Second DCA was correct in saying that Disobedience to Police is a Category 2 offense to a fleeing charge.

The Committee agrees with FPDA that the extra element of “police order was lawful” *may* be charged, which is why the Committee put Disobedience to Police in Category Two. The Committee also agrees with FPDA that the Second DCA’s opinions in *Koch* and *Lucas* referred to Disobedience as a Category 2 lesser-included offense of fleeing. The problem remains that it appears that the charging documents in *Koch* and *Lucas* tracked the fleeing statutes. In other words, although the State *may* charge that the police order was lawful, the State did not do so in *Koch* or *Lucas*. Nevertheless, the Second District said that the trial judge had to give Disobedience to Police as a lesser-included offense. In essence, although the Second District referred to Disobedience to Police as a Category 2 offense, it *treated* Disobedience to Police as a Category 1 offense. And as stated above, if the Second District is correct in holding that a charging document that tracks a fleeing statute requires trial judges to instruct on Disobedience to Police, then the crime of Disobedience to Police should be moved into the Category 1 box.

FACDL also submitted a comment about the published Committee note. FACDL also thought the Committee’s published comment was argumentative. FACDL further stated the Second District’s opinions were not contradicted by any other court and therefore represented the law in Florida. FACDL did not comment on whether they thought Disobedience to Police should be in the Category 1 or Category 2 boxes in the fleeing instructions.

Upon post-publication review, the Committee did not change its mind about leaving Disobedience to Police in the Category 2 boxes of all the fleeing instructions with an asterisk that refers people to the Comment sections. The Committee maintains that the results of *Koch* and *Lucas* are in conflict with *Jackson*, *Kirer*, and this Court’s case law on necessary lesser-included offenses. The Committee did reword its comment, though, in an effort to be less argumentative. In sum, the Committee proposes by a unanimous vote that all of the fleeing instructions contain a paragraph in the Comment section that reads as follows:

*The Second District Court of Appeal requires Disobedience to Police to be given as a lesser when the charging document tracks the Fleeing statute. *See Koch v. State*, 39 So. 3d 464 (Fla. 2d DCA 2010), and *Lucas v. State*, 192 So. 3d 1269 (Fla. 2d DCA 2016). The Committee retained Disobedience to Police in the

Category Two box, however, because Disobedience to Police requires the police order or direction to be lawful and the crime of Fleeing to Elude LEO does not contain that element. *See State v. Kirer*, 120 So. 3d 60 (Fla. 4th DCA 2013); *Jackson v. State*, 463 So. 2d 372 (Fla. 5th DCA 1985).

Proposals 4, 5, 6, and 7 – Instructions 28.6, 28.7, 28.8, and 28.8(a)

Other than stylistic changes, the only changes proposed for these four fleeing instructions were to add language in the Comment sections to cover the issue discussed in the initial note about all of the fleeing instructions. The proposals passed unanimously and were published in the *Bar News*. The FPDA and FACDL comments and the Committee’s response were previously discussed. The Committee voted unanimously to file the proposals with the Court.

Proposal 8 – Instruction 28.8(b)

This crime covers someone who leaves the scene of a crash involving injury or death and then flees from the police. Accordingly, the Committee made the same changes to this instruction that it made to the Leaving the Scene instruction (#28.4). Specifically, the words “or accident” were deleted and the explanation of “involved in a crash” was inserted. Both changes were required as a result of *Gaulden v. State* (see initial note for the Leaving the Scene proposals). The Committee also inserted its new paragraph about the Disobedience to Police issue and the new paragraph about the *Elder/Gaulden* issue into the Comment section of this instruction. The proposal was published in the *Bar News*. The FPDA and FACDL comments (and Attorney Radcliffe’s comment regarding the Leaving the Scene proposals) and the Committee’s responses were previously discussed. In sum, the Committee voted unanimously to amend this instruction so that it would be consistent with the relevant Leaving the Scene and Fleeing instructions and to file the proposal with the Court.

Proposal 9 – Instruction 28.8(c)

This crime also combines a Leaving the Scene with a Fleeing, but the Leaving the Scene in this crime is different than the Leaving the Scene in Proposal 1. Specifically, the Leaving the Scene in this crime is for the misdemeanor offense in § 316.061, Fla. Stat. (Leaving the Scene of a Crash Resulting Only in Damage to Property).

Only two changes needed to be made to the body of the instruction. The words “or accident” were deleted throughout the instruction and the definition of “involved in a crash” was inserted. Both changes were required as a result of

Gaulden v. State. Additionally, the new paragraph regarding the lesser-included offense of Disobedience to Police along with the new paragraph about the *Elder/Gaulden* issue were added to the Comment section. The proposal was published in the *Bar News*. The comments and the Committee responses have previously been discussed. In sum, the Committee voted unanimously to amend this instruction so that it would be consistent with the relevant Leaving the Scene and Fleeing instructions and to file the proposal with the Court.

Proposal 10 –Instruction 28.8(d)

The crime for this instruction covers a person who commits the felony version of Leaving the Scene (of a crash involving serious bodily injury, injury, or death) and then flees causing injury or property damage. Accordingly, all of the changes for the felony Leaving the Scene were made to this instruction (e.g., the words “or accident” were deleted throughout the instruction and the phrase “involved in a crash” was defined as required by *Gaulden v. State*. Additionally, the new paragraph regarding the lesser-included offense of Disobedience to Police and the new paragraph about the *Elder/Gaulden* issue were added to the Comment section.

The proposal was published in the *Bar News*. The comments and the Committee responses have previously been discussed. In sum, the Committee voted unanimously to amend this instruction so that it would be consistent with the relevant Leaving the Scene and Fleeing instructions and to file the proposal with the Court.

Proposal 11 –Instruction 28.8(e)

This crime covers the misdemeanor Leaving the Scene combined with a fleeing that causes injury or property damage. The words “or accident” were deleted throughout the instruction and the phrase “involved in a crash” was defined as required by *Gaulden v. State*. Additionally, the new paragraph regarding the lesser-included offense of Disobedience to Police and the new paragraph about the *Elder/Gaulden* issue were added to the Comment section.

The proposal was published in the *Bar News*. The comments and the Committee responses have already been discussed. In sum, the Committee voted unanimously to amend this instruction so that it would be consistent with the relevant Leaving the Scene and Fleeing instructions and to file the proposal with the Court.

In conclusion, the Committee requests the Court authorize for use the 11 proposals as outlined in Appendix A.

Respectfully submitted this 26th day of September, 2017.

s/ Judge F. Rand Wallis
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Chair, Supreme Court Committee on
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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and a copy of the report and the appendices have been emailed to the Honorable Robert Dillinger, President of the FPDA, at pd6@wearethehope.org; to Attorney Luke Newman of FACDL, at lukenewmanlaw.com, to Attorney William Ponall at bponall@ponalllaw.com; and to Attorney Gabrielle Radcliffe, at gabrielleradcliffe@rocketmail.com; this 26th day of September, 2017.

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